

WISCONSIN SUPREME COURT

TABLE OF PENDING CASES

Clerk of Supreme Court
Telephone: (608) 266-1880
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Web Site: www.wicourts.gov
Wisconsin Supreme Court Case Access: <http://wscca.wicourts.gov>

The following table describes pending cases the Supreme Court has accepted on petition for review, bypass, certification and original jurisdiction.

The cases included for the first time (that is, the most recently accepted cases) are marked with an * next to the case number. After the Supreme Court decides a case, the date of oral argument or date of submission on briefs is replaced with the date of the Supreme Court decision and abbreviated mandate. That mandate will generally be listed in the table for two months and then the case will be removed from the table.

The information in the table, from left to right, is as follows:

- the case number;
- an abbreviated caption of the case (case name);
- a statement of the issue(s);
- the date the Supreme Court accepted the case;
- the method by which the case came to the Supreme Court: REVW = Petition for review, CERT = Certification, CERQ = Certified Question, BYPA = Petition to bypass, ORIG = Original Action, WRIT = Petition for supervisory writ, REMD = Remanded from the U.S. Supreme Court;
- the date of oral argument or submission on briefs; or the date of the Supreme Court decision and an abbreviated mandate;
- the Court of Appeals district from which the case came, if applicable; the county;
- the date of the Court of Appeals decision, if applicable;
- whether the Court of Appeals decision is published or unpublished, and, if it is published, the citations to the public domain citation and the official reports for the Court of Appeals decision.

The statement of the issue is cursory and does not purport to be an all-inclusive, precise statement of the issues in the case. Readers interested in a case should determine the precise nature of the issues from the record and briefs filed with the Supreme Court.

The following table covers cases accepted and decisions issued through **September 13, 2012**. Please direct any comments regarding this table to the Clerk of Supreme Court, P.O. Box 1688, Madison, WI 53701-1688, telephone (608)266-1880.

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Case No.	Caption/Issue(s)	SC Accepted	CA Dist/Cty	CA Decision
2007AP221 & 2007AP1440	<u>Bostco LLC v. Milwaukee Metropolitan Sewerage District</u> Whether the plain language of Wis. Stat. §§ 893.80(3) and (5) restricts the judiciary's equitable power to award injunctive relief. Whether the statute's damage cap limits damages recoverable on a continuing nuisance claim of an ongoing interference with use and enjoyment of property that is abatable. Whether the statute's damage cap violates the equal protection clause of the state constitution on its face or as applied. Whether the government's taking ground water contained within a claimant's land without just compensation gives rise to an inverse condemnation claim and, if so, what would be the proper measure of damages. Because the District maintains and operates the Deep Tunnel pursuant to a DNR permit, is the District deprived of immunity under Wis. Stat. § 893.80(4) for its discretionary design decision to line only certain portions of the Deep Tunnel with concrete? Did the plaintiffs comply with Wis. Stat. § 893.80(1)'s notice of claim requirements?	02/23/2012 REVW Oral Arg 09/06/2012	1 Milwaukee	06/29/2011 Pub 2011 WI App 76 334 Wis. 2d 620 800 N.W.2d 518
2008AP1523	<u>Rock-Koshkonong Lake District, et al. v. DNR, et al.</u> Did the DNR correctly apply Wis. Stat. § 31.02(1) when considering effects upon property interests, such as residential values, business income, and public revenue? Did the DNR exceed the scope of its authority to protect "public rights in navigable waters" under § 310.02(1), by considering the effects of the water level order on private wetlands located above the ordinary high water mark? Did the DNR exceed the scope of its authority by applying Wis. Admin. Code § NR 103 to a water level proceeding under Wis. Stat. Ch. 31?	02/23/2012 REVW Oral Arg 09/05/2012	4 Rock	08/30/2011 Pub 2011 WI App 115 336 Wis. 2d 677 803 N.W.2d 853

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2009AP2432	<u>Acuity v. Society Insurance</u> If "faulty workmanship" is not an "occurrence" under a general liability insurance policy, then may an occurrence be found from a negative consequence caused by the faulty workmanship? Is the exclusion precluding coverage for damage to property on which the insured is performing operations limited solely to the specific property on which work is being done at the time of the property damage, or does the exclusion apply to all of the property within the insured's control and responsibility? When a claim falls within the economic loss doctrine, and therefore may only be brought as a breach of contract and not a tort claim, is there insurance coverage under a standard general liability policy for the breach of contract claim?	05/14/2012 REVW Oral Arg 11/06/2012	4 Monroe	02/29/2012 Pub. 2012 WI App 13 339 Wis. 2d 217 ___ N.W.2d ___
*2010AP425	<u>State v. Tramell E. Starks</u> Whether a defendant's motion to vacate a DNA surcharge counts as a prior motion for purposes of the successive motion bar under Wis. Stat. § 974.06(4) and <u>State v. Escalona-Naranjo</u> , 185 Wis. 2d 168, 517 N.W.2d 157 (1994), addressing specifically the holdings in <u>State v. Starks</u> , No. 2010AP425, unpublished slip op. (Wis. Ct. App. June 14, 2011), <u>State v. Matamoros</u> , No. 2009AP2982, unpublished slip op. (Wis. Ct. App. Dec. 21, 2010), and <u>State v. Nickel</u> , 2010 WI App 161, 330 Wis. 2d 750, 794 N.W.2d 765. What are the pleading standards for determining whether a defendant's allegations of ineffective assistance of postconviction counsel for failing to allege ineffective assistance of trial counsel satisfy the "sufficient reason" requirement of Wis. Stat. § 974.06(4)?	08/02/2012 REVW	1 Milwaukee	Unpub
2010AP1192-CR	<u>State v. Roshawn Smith</u> Whether the error that the court, instead of the jury, adjudicated the defendant's guilt on an element of the offense is subject to the harmless error rule; and if so, whether the error is harmless. Whether a defendant is entitled to a new trial where the trial court erroneously accepted the defendant's stipulation to an element of the offense without a valid jury waiver.	12/01/2011 REVW Reversed 07/12/2012 2012 WI 91	3 Brown	Unpub

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2010AP1366-CR	<u>State v. James G. Brereton</u> Whether the defendant's constitutional rights against unreasonable search and seizure were violated when law enforcement seized his vehicle, moved it to a private lot, obtained a warrant, and then installed a GPS tracking device, which allowed law enforcement to monitor the location of his vehicle in real time for several days? (cf. <u>State v. Sveum</u> , 2010 WI 92, 328 Wis. 2d 369, 757 N.W.2d 317 (<u>Sveum II</u>) and <u>United States v. Jones</u> , 565 U.S. ____ (2012), slip op.).	03/15/2012 REVW Oral Arg 09/06/2012	2 Walworth	09/28/2011 Pub 2011 WI App 127 ____ Wis. 2d ____ 804 N.W.2d 243
2010AP1952	<u>State v. Brian K. Avery</u> Whether it is error under the circumstances to grant a new trial based upon newly discovered evidence or on grounds that the real controversy was not fully tried due to the absence of the proffered new evidence which consisted of new video enhancement and photogrammetric analysis.	02/23/2012 REVW Oral Arg 10/05/2012	1 Milwaukee	11/29/2011 Pub 2011 WI App 148 337 Wis. 2d 560 807 N.W.2d 638
2010AP2003-CR	<u>State v. Courtney C. Beamon</u> Is a jury instruction which describes the factual theory alleged to satisfy an element legally erroneous? In a criminal case, are the instructions given the jury the law of the case against which the sufficiency of the evidence must be measured or is the evidence to be measured against "the actual elements of the offense"? Does the harmless error rule of <u>State v. Harvey</u> , 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189, apply when reviewing the sufficiency of the evidence for a conviction? Was <u>State v. Wulff</u> , 207 Wis. 2d 143, 153, 557 N.W.2d 813 (1997), which held a conviction may be upheld "only if there was sufficient evidence to support guilt on the charge submitted to the jury in the instructions" overruled by <u>State v. Harvey</u> , <u>supra</u> ?	04/25/2012 REVW Oral Arg 11/05/2012 (Justice On Wheels, Green County Justice Center)	2 Racine	09/28/2011 Pub 2011 WI App 131 336 Wis. 2d 438 804 N.W.2d 706

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2010AP2313	<u>Juneau County Star-Times v. Juneau County</u> Whether legal bills are "records" or "contractor's records" subject to disclosure under the Open Records Law (Wis. Stat. §§ 19.31 et seq.). Whether the argument that the records sought were not subject to disclosure was waived. Whether the requestor had a right to receive the records based upon an attorney-client relationship. Whether the records were "produced" under a contract between the county and an insurance corporation.	02/23/2012 REVW Oral Arg 09/05/2012	4 Juneau	11/29/2011 Pub 2011 WI App 150 337 Wis. 2d 710 807 N.W.2d 655
2010AP2597-CR	<u>State v. Dennis D. Lemoine</u> When the court concludes or assumes that a defendant's statement was involuntary and improperly admitted at trial, can the court rely upon the defendant's testimony at trial to determine harmless error, without examining whether that testimony was tainted by the erroneously admitted statement? (<u>See Harrison v. United States</u> , 392 U.S. 219 (1968) and <u>Wisconsin v. Anson</u> , 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776, 784). Can the court conclude that an erroneously admitted statement was harmless by analyzing the evidence, absent the error, without addressing the impact of the erroneously admitted evidence? Is a defendant's noncustodial statement involuntary if an officer makes promises, uses deceit, and does not advise the defendant of his <u>Miranda</u> rights when eliciting the statement?	01/25/2012 REVW Oral Arg 10/04/2012	4 Sauk	Unpub
2010AP3034-CR	<u>State v. Kenneth M. Sobczak</u> May a temporary houseguest consent to a police search of his or her host's home and a computer located inside the home that the houseguest was explicitly permitted to use?	06/13/2012 REVW	2 Washington	01/25/2012 Pub 2012 WI App 6 338 Wis. 2d 410 808 N.W.2d 730
2010AP3153	<u>Lynn Bethke v. Auto-Owners Insurance Company</u> Does the definition of underinsured motor vehicle in the insurer's policy function as an impermissible reducing clause when applied to the facts of this case, rendering the insurer's refusal to tender the underinsured motorist coverage to the policy holders a violation of Wisconsin Stat. § 632.32(4m) and (5)(i)? Was Auto-Owners' refusal to tender the underinsured motorist policy proceeds to the policy holders based on its policy definition of underinsured motor vehicle contrary to public policy?	06/13/2012 REVW Oral Arg 10/09/2012	2 Sheboygan	Unpub

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2011AP364	<u>Robert J. Koscielak v. Stockbridge-Munsee Community</u> Whether a tribal-owned business is not entitled to tribal sovereign immunity from a tort action brought in state court by an injured guest where the business activities are attenuated from the Tribe. Is the multi-factor "arm of the tribe" analysis set forth in <u>McNally CPA's & Consultants, S.C. v. DJ Hosts, Inc.</u> , 2004 WI App 221, ¶8, 277 Wis. 2d 801, 692 N.W.2d 247, the controlling legal test for Wisconsin courts to apply to determine when any sovereign immunity enjoyed by a Tribe may properly extend to a tribally-owned business entity? Based on a <i>de novo</i> review under the <u>McNally</u> test, or other "arm of the tribe" test that this court may establish, is the tribal-owned business an "arm of the tribe"? Under an "occurrence" type insurance policy, are the plaintiffs entitled to the benefit of mandated non-immune liability insurance coverage based on the Tribe's legal position at the time of the "occurrence" in an unrelated federal case that the tribal-owned business was a gaming entity under its Gaming Compact? Does the court have the authority to create an exception to the established rule of tribal sovereign immunity? Do the facts of this case, which involve a unit of the tribe itself, present an occasion for clarifying or modifying factors developed by other courts for determining whether a tribe's immunity extends to a separately-incorporated organization? May an ordinary commercial general liability carrier be held directly liable to an injured party if its insured is immune?	06/13/2012 REVW Voluntary Dismissal 08/01/2012	3 Shawano	03/28/2012 Pub 2012 WI App 30 340 Wis. 2d 409 811 N.W.2d 451
2011AP407/408/ 409-CR	<u>State v. Brent T. Novy</u> Was it error to allow fingerprint evidence to be admitted in the state's rebuttal after the court had previously ruled the evidence was not admissible because the state violated the discovery statute by not providing it to the defense? Was defendant-appellant-petitioner deprived of the right to an impartial jury and fair trial when defense counsel observed a juror sleeping during his closing argument?	06/13/2012 REVW Oral Arg 10/09/2012	2 Kenosha	01/25/2012 Pub 2012 WI App 10 338 Wis. 2d 439 809 N.W.2d 889

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2011AP564	<u>Marshall Schinner v. Michael Gundrum, et al.</u> Is the act of giving alcoholic beverages to underage persons at a party leading to an injury to a person at the party an "occurrence" or "accident" as that term is used in a homeowner's liability insurance policy? Does the act of hosting a party in a secluded shed on separate business property have some connection with that real property where it happened so as to constitute a "claim arising out" of a business location that was not the insured home? Does the storage of some personal property on undisputedly business property that is not listed or defined as an insured location on a homeowner's insurance liability policy convert the business location to an insured location under the homeowner's insurance liability policy?	06/13/2012 REVW Oral Arg 10/23/2012	2 Washington	03/28/2012 Pub 2012 WI App 31 340 Wis. 2d 195 811 N.W.2d 431
2011AP593	<u>Angelia Jamerson v. Department of Children & Families</u> Does a conviction of a public benefits offense pursuant to Wis. Stat. § 49.12(1) and (6) (1989-90) constitute as a matter of law "[a]n offense involving fraudulent activity as a participant" in certain public benefits programs for purposes of the Wis. Stat. § 48.685(5)(br)5. bar to childcare licensure? What level of deference should be applied to the Department of Children and Families' determination that a conviction for public benefits fraud contrary to Wis. Stat. § 49.12(1) and (6) (1989-90) constitutes as a matter of law "[a]n offense involving fraudulent activity as a participant" in certain public benefits programs for purposes of the Wis. Stat. § 48.685(5)(br)5. bar to child care licensure? Did a Division of Hearings and Appeals administrative law judge properly grant the motion to dismiss filed by the Department of Children and Families in a child care provider's chapter 227 child care license revocation appeal without first conducting a contested case hearing?	06/13/2012 REVW Oral Arg 10/09/2012	1 Milwaukee	03/28/2012 Pub 2012 WI App 32, 340 Wis. 2d 215, 813 N.W.2d 221
2011AP813-CR & 2011AP814	<u>State v. Juan J. Gracia</u> <u>City of Menasha v. Juan J. Gracia</u> Was the warrantless police entry into Juan Gracia's bedroom lawful under the community caretaker doctrine and did the trial court properly deny Gracia's motion challenging his prior conviction on the grounds that he had not validly waived his right to counsel?	05/14/2012 REVW Oral Arg 10/23/2012	2 Winnebago	Unpub

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2011AP825 & 2011 AP826	<u>Dane County Dept. of Human Services v. Mable K.</u> When a trial court grants partial relief on remand in a termination of parental rights (TPR) appeal, is further appeal precluded by the ordinary rules of civil procedure? Where the trial court determines that it denied the right to counsel during a TPR trial, must the court grant an entirely new hearing before a different judge or may the court remedy the violation by returning the parent to that point of the proceedings where the deprivation occurred and permitting the parent's counsel to present evidence for determination as to whether to order default? Did the trial court misuse its discretion when it did not vacate a 10 minute-old default judgment when the cognitively challenged parent arrived in court?	05/03/2012 REVW Oral Arg 09/07/2012	4 Dane	Unpub
2011AP914	<u>Estate of Danny L. Hopgood v. Jimmy D. Boyd</u> Whether the plaintiffs properly "swore to" the contents of their notices of claim, thereby strictly complying with Wis. Stat. § 893.82 and the requirements of <u>Kellner v. Christian</u> , 197 Wis. 2d 183, 539 N.W.2d 685 (1995).	06/13/2012 REVW Oral Arg 11/06/2012	4 Dane	Unpub
2011AP1030-CR	<u>State v. Gerald D. Taylor</u> Whether the trial court properly employed the harmless error doctrine to deny the defendant's plea withdrawal motion without a hearing where the court had misinformed the defendant about the maximum sentence he faced with a repeater allegation. (<u>See State v. Bangert</u> , 131 Wis.2d 246, 389 N.W.2d 12 (1986)). Whether there is a conflict between the holdings in <u>State v. Brown</u> , 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906 and <u>State v. Cross</u> , 2010 WI 70, 326 Wis. 2d 492 786 N.W.2d 64 requiring resolution by the court.	03/15/2012 CERT Oral Arg 09/06/2012	3 Outagamie	--
2011AP1044-CR / 2011AP1105-CR	<u>State v. Dale R. Neumann</u> <u>State v. Leilani F. Neumann</u> What is the scope of the prayer treatment exception under Wis. Stat. § 948.03(6) where defendants are charged with second-degree reckless homicide under Wis. Stat. § 940.06 (1) and what are the appropriate jury instructions when that exception is raised in a reckless homicide case?	06/13/2012 CERT Oral Arg 10/05/2012	3 Marathon	--

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2011AP1240	<u>Patricia A. Johnson v. Michael R. Masters</u> Is it an "action" barred by the statute of repose, Wis. Stat. § 893.40, when a wife seeks to obtain a pension award by submitting a qualified domestic relations order (QDRO) as required by the divorce judgment, and the submission is approximately one year after the former husband retires, but more than twenty years after the divorce judgment?	05/14/2012 CERT Oral Arg 09/07/2012	2 Waukesha	--
2011AP2067	<u>Mary E. Marlowe v. IDS Property Casualty Ins. Co.</u> Because there is no statutory authority specifying discovery in arbitration (outside of depositions under § 788.07), after <u>Borst v. Allstate Ins. Co.</u> , 2006 WI 70, 291 Wis. 2d 361, 717 N.W.2d 42, do arbitrators have the inherent authority to determine the necessity and scope of allowable discovery in the absence of an express agreement by the parties? In light of <u>Borst</u> , does an arbitration panel have exclusive authority to interpret an arbitration agreement to determine discovery procedures that apply to an arbitration absent an express agreement by the parties? When arbitration is an alternative to litigation and formal court proceedings, should an arbitration panel, absent an explicit clause in an arbitration contract, order the parties to participate in formal discovery proceedings that would generally only be available to litigants in the circuit court process? After <u>Borst</u> , in the absence of an express agreement by the parties as to the scope of discovery, does a party have a right to request declaratory relief from the trial court on the interpretation of an arbitration clause in an automobile insurance policy? If the court determines that the plaintiffs were seeking an intermediate review of an arbitration panel decision, can intermediate rulings by an arbitration panel be challenged in the circuit court before a final award is made on the grounds that an arbitration panel did not have authority to act in the first place?	06/13/2012 REVW Oral Arg 10/04/2012	3 Brown	04/25/2012 Pub 2012 WI App 51 340 Wis. 2d 594 811 N.W.2d 894
2012AP544-W	<u>Office of the State Public Defender v. Court of Appeals, District IV</u> Is defense postconviction counsel in a merit appeal required to first seek circuit court permission to "access, cite to, and quote from a PSI [presentence investigation] report" before litigating a PSI-related sentencing issue? Does the decision in <u>State v. Parent</u> , 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915, which related to a no-merit appeal, also require such circuit court permission in a merit appeal?	06/13/2012 WRIT Oral Arg 11/05/2012 (Justice On Wheels, Green County Justice Center)	4 Wood	--

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